No. 02-241

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IN THE

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, and the BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* JUDITH AREEN, KATHARINE BARTLETT, MICHAEL FITTS, ANTHONY KRONMAN, DAVID LEEBRON, SAUL LEVMORE, RICHARD REVESZ, KATHLEEN SULLIVAN, LEE TEITELBAUM, AND DAVID VAN ZANDT -- IN THEIR INDIVIDUAL CAPACITIES AS DEANS OF, RESPECTIVELY, GEORGETOWN LAW CENTER, DUKE LAW SCHOOL, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, YALE LAW SCHOOL, COLUMBIA LAW SCHOOL, UNIVERSITY OF CHICAGO LAW SCHOOL, NEW YORK UNIVERSITY LAW SCHOOL, STANFORD LAW SCHOOL, CORNELL LAW SCHOOL, AND NORTHWESTERN UNIVERSITY SCHOOL OF LAW -- IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE* [1]

Judith Areen, Katharine Bartlett, Michael Fitts, David Leebron, Saul Levmore, Anthony Kronman, Richard Revesz,

[1] No counsel for any party authored any part of this brief. No person or entity other than the Law School Deans and their counsel made any monetary contribution toward the preparation or submission of this brief. The Petitioner and Respondent have consented to the filing of this brief.

Kathleen Sullivan, Lee Teitelbaum, and David Van Zandt are the Deans of, respectively, Georgetown Law Center, Duke Law School, University of Pennsylvania Law School, Yale Law School, Columbia Law School, University of Chicago Law School, New York University Law School, Stanford Law School, Cornell Law School, and Northwestern University School of Law (collectively, "Law School Deans"). This brief is being submitted on behalf of the Law Schools Deans in their individual capacities, not by their law schools, which are listed for identification purposes only.

The Law School Deans submit this brief in support of the University of Michigan Law School and urge the affirmance of the Sixth Circuit's decision in this case. Reversal of that ruling would threaten the admissions practices employed by the Law School Deans' private universities. Most institutions of higher education receive substantial federal funds, and Title VI of the 1964 Civil Rights Act prohibits schools that receive federal funds from impermissibly classifying on the basis of race. *See* 42 U.S.C. § 2000d (2000). Because Title VI is generally interpreted co-extensively with the Fourteenth Amendment, *see Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), reversal of the ruling below, which concerns *public* law schools, could threaten the freedom to consider race-based diversity by *private* institutions as well.

SUMMARY OF ARGUMENT

The Law School Deans appreciate the difficulty and complexity of the issues presented by this case. It is precisely for that reason that the Law School Deans believe that universities and law schools should have the freedom to resolve these matters in ways that they believe are most consistent with the academic and social missions of their schools—and not through rigid constitutionalization of the admissions process by federal courts.

Each of the Law School Deans has firsthand experience with the benefits a diverse classroom setting can provide in the educational and social missions of a school. A diverse student body benefits all students, of all races and of all backgrounds. And, for law schools especially, racial and cultural diversity is crucial in order to prepare students to be effective and responsible lawyers, academics, and judges in an increasingly multi-racial, multi-ethnic, and multi-cultural world. These benefits have been recognized by this Court in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), and the Law School Deans have both relied upon and adhered to *Bakke* in crafting and implementing admissions policies that further diversity among their student bodies.

This determination about the value of diversity reflects the academic judgment of the Law School Deans and their faculties. They ask this Court to be cognizant of their views as a matter of academic autonomy—a constitutional value that not only furthers the education of students, but also benefits society as a whole. Just as the Law School Deans would not support a court decision to force affirmative action on an unwilling law school with no previous history of racial discrimination, so too they would oppose a decision that forbids it when it is practiced appropriately. At stake in this case is the very freedom of academic institutions to act within reasonable bounds to further their educational and social missions.

ARGUMENT

I. SOCIAL EXPECTATIONS HAVE CRYSTALLIZED AROUND JUSTICE POWELL'S DECISION IN *BAKKE*, AND THESE EXPECTATIONS STRONGLY MILITATE AGAINST REVERSAL OF THIS COURT'S PREVIOUS INSTRUCTIONS TO UNIVERSITIES.

Because of the compelling interest served by a diverse student body—that is, enhancing learning, improving the profession, and furthering the progress of this Nation, the Law School Deans embraced Justice Powell's opinion in *Bakke*, and believe that their universities, the profession, and society as a whole have been the better as a result. Although each Dean views law school admissions in a slightly different way, all of them realize that any judicial pressure to adopt a race-blind admissions process will threaten the quality and diversity of their student bodies, as well as a profession that is dedicated to serving society as a whole. Forcing universities to adopt such an admissions process would cause a dramatic change in social practice and would frustrate expectations that, while different from school to school, have crystallized around Justice Powell's opinion in *Bakke*, and have become firmly engrained in our universities today.

A. Justice Powell's Opinion In Bakke Announces A Principle That Has Been Undisturbed By This Court's Government Contracting Jurisprudence.

Justice Powell's celebration of diversity has become central to contemporary society, so much so that even *amicus* United States Government does not deny that race may be a relevant consideration in university admissions. The United States does not urge the overruling of *Bakke*. Nor does the United States take the position that any consideration of race presumptively triggers the same kind of strict scrutiny as does the use of race in contracting. Indeed, the United States

Government's submission to this Court does not repudiate *any* of the statements it made in the district court, all of which support the Law School Deans' position:

- "During the nearly two decades since *Bakke* was decided, Justice Powell's landmark opinion has guided the admissions policies of public and private educational institutions throughout the United States. On the authority of Justice Powell's opinion, most selective colleges and professional schools have continued to consider race in admitting students. The Department of Education has relied on Justice Powell's opinion in advising educational institutions that narrowly tailored affirmative action for purposes of diversity does not violate the Constitution or Title VI." Brief of the United States as *Amicus Curiae*, *Grutter v. Bollinger*, No. 97-CV-75928-DT (E.D. Mich. dated April 30, 1999), at 16.
- "As Justice Powell recognized . . . the consideration of race as a factor in university admissions can make a vital contribution to a school's educational mission by permitting the school to assure that it enrolls a truly diverse student body. Such diversity fosters a robust exchange of ideas, affirmatively promotes integration and understanding, and ultimately enriches both the students themselves and the broader community." *Id.* at 14.
- "[T]he Supreme Court has long recognized academic freedom . . . as 'a special concern of the First Amendment.' . . . In exercising that freedom a university may consider whether and how to admit a diverse class." *Id.* at 6 n.7 (citation omitted).
- "Social science research confirms the educational benefits of a diverse student body." *Id.* at 18.
- "The goal of educational diversity simply has no relevance to the awarding of construction contracts, and accordingly was not considered by the Court in *Croson* or *Adarand*." *Id.* at 12.

And, even in its submission to this Court, the government concedes that it has a responsibility to "ensure" that "public

institutions, *especially* educational institutions, are open and accessible to a broad and diverse array of individuals, including individuals of all races and ethnicities." Brief for the United States as *Amicus Curiae* Supporting Petitioner at 8 (filed Jan. 17, 2003) (emphasis added).

Strong reasons underlie the government's position. This Court—from *Brown* to *Bakke* and *Ambach* to *Adarand*—has recognized the uniqueness of education. Yet the Law School Deans understand that rigid race-based classifications would not further either diversity or educational interests more generally. Instead, universities should remain free to use race as one factor, on a flexible basis, in their admissions decisions.

The distinction between rigid "classifications" and flexible "considerations" is the unbroken principle in contemporary constitutional law.[2] This distinction can be traced back to Justice Powell's three points in *Bakke*. *First*, Justice Powell

[2] Part V-C of the *Bakke* opinion, which announced the judgment of the Court, reiterated several times that it was approving racial considerations: "In enjoining [Davis] from ever *considering* the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive *consideration* of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins [Davis] from any *consideration* of the race of any applicant must be reversed." *Bakke*, 438 U.S. at 320 (emphasis added). *See also Metro Broad., Inc. v. FCC*, 497 U.S. 547, 621 (1990) (O'Connor, J., dissenting) (citing *Bakke* and stating that "race-conscious measures might be employed to further diversity only if race were one of many aspects of background sought and considered relevant to achieving a diverse student body"); *id.* at 625 (citing Justice Powell in *Bakke* for the notion that government may not allocate benefits "*simply* on the basis of race" (emphasis added)); *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) (citing Justice Powell's opinion in *Bakke* and stating that "a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial *considerations* in furthering that interest" (emphasis added)).

found that an affirmative action program based on diversity passes constitutional muster because it offers democratic and dialogic educational benefits to all students. *Second*, a university should not use a strict quota or a rigid set-aside in an attempt to enhance diversity; it must look instead to the whole person.[3] And, *third*, Justice Powell concluded that the Davis plan was unconstitutional because it ignored non-racial diversity. *Bakke*, 438 U.S. at 319.

Justice Powell's three arguments were tightly intermeshed. One reason that a university must not use a rigid quota is that doing so could lead the school to admit unqualified students, which would undermine the school's educational mission. Racial quotas could also hamper a university's ability to admit non-racially diverse students. And one reason that non-racial diversity is so important is to ensure that all students are exposed to people different from themselves, that is, to African-Americans who grew up in the inner-city to Caucasian "farm boy[s] from Idaho"—and to every permutation in between. *Id.* at 316.

Although the diversity rationale does not justify rigid "classifications," it is sufficiently compelling to uphold the use of race as a "consideration," or a "plus," in admissions. Indeed, this Court's recent voting rights case, *Easley v. Cromartie*, 532 U.S. 234 (2001), confirms this distinction, holding that redistricting is constitutional when race is "*a motivation* for the drawing of a majority minority district," so long as it is not "*the 'predominant factor'* motivating the legislature's districting decision." *Id.* at 241 (quotations

[3] Justice Powell did not believe that diversity was a magical phrase that a university could incant to justify any admissions plan; indeed, Justice Powell voted to strike down the Davis program. The Justice wrote that the program's "fatal flaw" was "its disregard of individual rights," because "[i]t tells applicants who are not Negro, Asian, or Chicano that they are *totally excluded* from a specific percentage of the seats in an entering class." *Bakke*, 438 U.S. at 319, 320 (emphasis added).

omitted) (emphases added). *Easley* also recognized that because decision-makers are often aware of racial demographics, it would be unrealistic and unwise to force such decision-makers to try to disregard such information. *Id.* at 255-56. Several other decisions follow this distinction between rigid classifications and flexible considerations.[4]

In short, this Court's recent decisions regarding government contracts do not limit the holding of *Bakke*. The differences between government contracting and law school admissions are numerous and profound. As an initial matter, academic autonomy was not at stake in any of the government contracting cases. Moreover, government contracts are susceptible to fraud because contracts may be awarded to "minority" firms where minorities are not the true contractors

[4] *See Shaw v. Reno*, 509 U.S. 630, 646, 648 (1993) (stating it is "antithetical to our system of representative democracy" when "a district obviously is created *solely* to effectuate the perceived common interests of one racial group," but that "the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors," and that "[t]hat sort of race consciousness does not lead inevitably to impermissible race discrimination" (emphases added)); *Miller v. Johnson*, 515 U.S. 900, 928-29 (1995) (O'Connor, J., concurring) (stating that the majority opinion "does not throw into doubt the vast majority" of the districts because "States have drawn the boundaries in accordance with their customary districting principles. . . . even though race may well have been *considered* in the redistricting process" (emphasis added)); *Adarand v. Pena*, 515 U.S. 200, 227, 229 (1995) (applying strict scrutiny for "racial classifications," but stating that it is permissible to distinguish between a race-conscious "No Trespassing" sign and a race-conscious "welcome mat"); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality op., per O'Connor, J.) (condemning Richmond's "rigid rule" denying Caucasians "the opportunity to compete for a fixed percentage of public contracts based *solely* upon their race" (emphasis added)); *Johnson v. Transp. Agency*, 480 U.S. 616, 656 (1987) (O'Connor, J., concurring in the judgment) (approving an affirmative action plan in which gender was used as a "plus factor," and explicitly distinguishing plans that select individuals "solely" on the basis of gender).

or are present only as corporate fronts. By contrast, the opportunities for fraud in education are constrained by guidance counselors and parents, as well as by the law schools themselves. In addition, a wider range of people benefits from preferences in education than from contracting set-asides, which often help one particular firm, oftentimes the one well-off or well-connected. Also, contracts are awarded to people throughout their adult years and have "no logical stopping point." University education, however, typically occurs early in life and then ends. Law school education can be a ramp up to a level playing field for the rest of one's future.[5]

And, of course, a crucial difference between contracts and education is diversity: Contracting set-asides mean that "minority firms" win some projects, and "Caucasian firms"

[5] The dissent in *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting), recognized these very same distinctions. *First*, it argued that the FCC's theory lacked a logical stopping point and appeared to call for strict racial proportional representation. *Id.* at 613. *Second*, it noted that FCC licenses are "exceptionally valuable property," and that, "given the sums at stake, applicants have every incentive to structure their ownership arrangement to prevail in the comparative process"—perhaps creating the possibility of fake figureheads. *Id.* at 630. *Third*, the dissent emphasized that diversity of ownership may not provide diversity of programming. Explicitly invoking Justice Powell's opinion in *Bakke*, the dissent argued that market forces shape programming so that station owners have limited control over content. *Id.* at 619. And, *fourth*, the dissenting opinion found the FCC licensing scheme problematic because it operated by "identifying what constitutes a 'black viewpoint,' . . . and then using that determination to mandate particular programming." *Id.* at 615. By contrast, a proper admissions plan does not assume that there is only one way to be "Black" or "Asian." An African-American follower of William Kristol or Colin Powell is no less "authentically" African-American than an adherent of Madeleine Albright or William Julius Wilson. Justice Powell's *Bakke* Appendix pointedly quoted Harvard's recognition of the importance of intra- as well as inter-racial diversity. *See Bakke*, 438 U.S. at 324 (appendix to the opinion of Powell, J.).

do not, with the possible effect of balkanizing the races. Moreover, set-asides can be awarded to wholly non-integrated firms, and, thus, would not help bring Americans together.

In sharp contrast, education unites people from different walks of life. And integrated education advantages all students in a distinctive way, by bringing rich and poor, black and white, urban and rural, together to teach and learn from each other as democratic equals.[6] A school admits students, in large part, so that they will be teachers to other students. LSAT scores and grades are a proxy for a student's potential to teach other students, but, often, an applicant's background

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[6] As to legal education, this Court stated a fundamental truth in *Sweatt v. Painter*:

> The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

339 U.S. 629, 634 (1950) (quoted by Justice Powell in *Bakke*, 438 U.S. at 314).

And, what was true in *Bakke* about medical school applies with even greater force to the study of law, which is all about understanding different points of view and preparing students for citizenship in a national and global community. Numerous studies show how diversity furthers the educational mission of law schools. *See, e.g.*, Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools* (Harvard Univ. The Civil Rights Project ed., 1999) (finding, after extensive analysis of Harvard and Michigan Law Schools, that diversity is important to the educational experience); Expert Report of Robert Webster at 4-5 (same); Expert Report of Patricia Gurin at 15 (same); Expert Report of Derek Bok at 5-6 (stating that without consideration of race, African-Americans would become an extremely small percentage of the student body at premier law schools); Anthony T. Kronman, *Is Diversity a Value in American Higher Education?*, 52 Fla. L. Rev. 861, 865 (2000).

and life experience are essential components of this potential as well. If a sprawling democratic republic as diverse and divided as 21st century America is to flourish, it must develop some common spaces where people from different segments of society can come together to learn how others live, how others think, and how others feel. Our Nation's law schools should continue to have the freedom to be such a space.

B. *Bakke* Is The Bedrock Of The Law Schools' Admissions Practices.

A diverse student body is nothing less than fundamental to enabling the Law School Deans to fulfill their high responsibility as educators. Charged with preparing men and women for careers in every conceivable arena of private practice, government service, corporate governance, civil and human rights, and leadership roles, across the fields of business, art, music, film, publishing, science, professional athletics, philanthropy, and higher education, it is clear that the major law schools, to a significant degree, shape American culture at large. These law graduates provide professional services and leadership to the increasingly diverse society, here and abroad, confronting everyday economic, political, and legal challenges embedded in our Nation's values of justice and equality. A diversity of backgrounds, life experiences, and cultural perspectives in the universities' student bodies is essential to providing both a sound legal education for students and a firm foundation for graduates to serve and to lead thereafter.

Thus, each year, the Deans and the faculties of these law schools renew their commitment to crafting entering classes distinguished not only by their exceptional intellectual talent and academic achievements, but also by their potential for educating their classmates and challenging their faculties, thereby enriching the educational experience for all, within and beyond the classroom. To that end, the Law School

Deans work hard to identify and attract a truly diverse student body, diverse across many different dimensions. At the major law schools, one finds assembled a wide variety of political and religious beliefs; diverse cultural, socio-economic and ethnic backgrounds; students coming to study law from a broad range of academic disciplines and intellectual perspectives, with differing motivations for undertaking legal study; and students representing hundreds of various colleges from around the globe, and reflecting manifold professional and cultural backgrounds, reflecting a range of educational, work, and life experiences.

This intellectually stimulating, educationally enriching, and professionally rewarding amalgam of diverse perspectives and backgrounds is not the product of happenstance. It is specifically designed and developed by professionals who labor strenuously to identify, encourage, engage, and attract applicants who are academically distinguished and personally distinctive.

All of the Law School Deans have their schools invest in vigorous recruitment programs, primarily in the fall, to reach out to prospective applicants then enrolled in many types of undergraduate schools—near and far, public and private, large and small, secular and religious, single-sex and historically black, traditional and experimental. These law schools also participate in forums across the country to reach older applicants, most of whom no longer have access to pre-law advisors, as undergraduate applicants do.

When their fall travels conclude, these law schools commence a "reading season" and selection process. The composition of the admissions selection committee across the law schools varies: Some delegate the responsibility of student selection to faculty; others to professional admission officers; and others to a committee comprising both faculty and administrators. Notwithstanding who is charged with selection, *all* of these law schools employ similar selection methods—methods designed from and based on Justice Powell's opinion in *Bakke*.

Specifically, applications are generally reviewed by the respective committees in the order in which they are received. No file is presented to committee for evaluation until it is entirely complete. None of the Deans' law schools has a predetermined numerical goal or quota for *any* segment of the entering classes.[7]

This selection method does not recognize any applicant as being entitled to admission based on the quantifiable indices of LSAT Scores and/or grade point averages ("GPA"). These law schools employ neither any LSAT "cut-off" scores nor any GPA "thresholds," above or below which an applicant is automatically admitted or rejected. The Law School Deans consider the GPA to be an important, although only partial, reflection of the quality of academic performance. In evaluating an applicant's academic history, these law schools go far beyond a cursory reading of GPAs, by analyzing closely such factors as the rigor of the curriculum, institutional grade-inflation patterns, and, of course, the selectivity and other reputational factors of the undergraduate college or graduate program attended. The analysis of academic perfor-

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[7] The government argues that the University of Michigan must be employing a quota system based simply on the fact that the percentage of minority students has hovered around 44 to 47 each year from 1995 to 1998. This argument is belied by the admission rates of other segments of the student body that, like the minority population at Michigan, remain constant from year to year. For example, at Duke Law School, 26-year-olds have consistently constituted between 5% and 7% of the entering class, and there is certainly no quota at Duke for 26-year-old students. And, at Columbia Law School, the number of students in the last four entering classes who majored in political science and government has been 20% each year, and the number of students from the southern United States has stayed largely constant during this period as well (between 15% and 17%).

mance is, then, a multivariate one, and the evaluation of an applicant *always* goes behind and beyond the numbers.

In addition to evaluating a candidate's overall academic history and performance on the LSAT, each law school, generally through a combination of a professional staff and faculty committee, examines carefully the applicant's personal essay or statement and letters of recommendation, as well a host of additional information elicited in the application, such as course selection, special honors and awards, fellowship opportunities, publications, extracurricular involvment, community service, political activity, professional contributions, and work experience. In reviewing the applications of the thousands of men and women who seek admission to each of the Deans' law schools each year, the law schools place primary emphasis on demonstrated qualities and proven skills they regard as necessary for academic success and intellectual engagement at their respective law schools.

In evaluating each and every individual candidate for admission, the Law School Deans consider carefully race as one factor—along with many other personal, academic, and professional criteria. Therefore, in assembling an entering class, the Law School Deans consider carefully racial background—particularly its relationship to social condition, opportunity, and its potential for educational enrichment—as one important factor *among many* as they shape the character of their prospective law student bodies.[8] This is part of the

[8] Other major law schools use similar criteria. *See, e.g.*, University of Arizona Law School Admissions Process, available at http://www.law.arizona.edu/admissions/info.html ("We believe that diverse experiences, ideas and goals are essential to a vital educational process and a dynamic legal profession. In addition to academic records and test scores, the Committee looks to other factors in the assessment of applicants, including colleges or universities attended, course of study, grade trends, graduate study, significant or extracurricular activities, unique educational or occupational experiences, involvement in community affairs, substantial community service, race and ethnicity, economic or cultural background, participation in pre-law school programs (e.g., CLEO) and any other factors that may justifiably be relied upon in appraising the qualifications of applicants for success in law school and contribution to the legal profession.").

universities' embrace of many non-academic factors in evaluating each and every applicant for admission while ensuring the highest levels of admissions selectivity and academic excellence, which are at the core of their institutional histories, traditions, and current renown.

The Law School admissions counselors also value manifest personal strengths, which they believe predict professional distinction and public service. They endeavor to identify how and to what extent candidates have exercised their values and achieved their goals, that is, how they have actually chosen to commit their time, energies, and talents. The committees attempt to judge how an applicant has made use of his or her talents and opportunities. Applicants are evaluated, therefore, not only on their potential, but also by their demonstrated motivation, discipline, and industry. The various admissions committees weigh carefully the elements of the application that speak to the candidate's background, interests, and goals, and that evidence sound character, judgment, and values.

This approach to selection yields each year entering J.D. classes with exceptionally strong prospects for academic success, for educating one another, for challenging the faculties, and for enhancing life and learning at the law schools—learning that goes on in classrooms, seminars, clinics, internships, workshops, journals, conferences, brown bag luncheon discussions, and countless hours of engaging conversation.

In addition to determining whether a given applicant has demonstrated the talents, skills, and motivation to thrive in these exceptionally rigorous programs, the selection committees examine all elements of the application to determine how and to what extent that applicant would contribute, to the

educational program and process, various "enrichment" factors. Each of the Law School Deans is committed to educating students who, beyond their intellectual power and proven academic skills, will bring values, beliefs, knowledge, and perspectives that will enliven and enrich the learning experience for all.

These admissions practices—forged over years of experience and carefully crafted to adhere to Justice Powell's opinion in *Bakke*—will all be jeopardized in the private universities if this Court reverses the judgment of the Sixth Circuit. Although one cannot predict with certainty whether reversal would cause educational institutions to decrease their reliance upon the limited quantitative standards of merit, it is inappropriate for federal courts to determine for these institutions the weight that should be accorded such standards during the admission process, as the United States Government has suggested.[9]

In addition, many of the supposedly "race-neutral" alternatives are neither available nor sufficient. And some are simply futile. For example, geographical solutions, like the State of Texas's 10% plan, do not work for graduate schools or law schools with national and international student bodies. Geographical solutions are also rooted in the historical contingency of residential segregation, which is a consequence of past racism. And to the extent that such alternatives ever amount to producing diversity admissions, they exact a price upon other values, such as candor,

[9] *See Grutter v. Bollinger*, No. 97CV75928-DT, 2001 WL 293196, at *26 (E.D. Mich. Mar. 27, 2001) (criticizing the university for not "decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores, using a lottery system for all qualified applicants, or a system whereby a certain number or percentage of the top graduates from various colleges and universities are admitted"); *id.* at *43 ("One such solution may be to relax, or even eliminate, reliance on the LSAT."); *id.* at *44 ("Another solution may be for the law school to relax its reliance on undergraduate GPA.").

transparency, merit, and truth—as John Yoo and others have recognized. *See, e.g.*, Jeffrey Rosen, *Damage Control*, New Yorker, Feb. 23, 1998, at 64, 68 (John Yoo stating about the California plan: "if you still want to get African-Americans and Hispanics in you have to redefine the central mission of the research university in a way that lowers standards for everybody . . . . Once you start telling people that merit doesn't matter when they're at the formative stages of their careers, I think you do long and lasting damage to America."). Such hypocrisy and subterfuge are inimical to academic principles.[10]

Some institutions may decide to reduce or eliminate altogether their reliance on quantitative standards of merit in order to achieve the educational benefits of diversity. Others, of course, may decide otherwise. But, in the same way that judges should not be forced to select law clerks solely on the basis of their GPAs, so, too, each academic institution should be free to decide how best to further its educational and social missions. And had the court below enjoined law schools from considering, as one factor among many, an applicant geography, an applicant's undergraduate school, or an applicant's undergraduate major, the Law School Deans would raise the same constitutional concern that they raise here.

[10] Whether any screening method used in a subjective decision-making process can be truly "race-neutral" is a question that cannot be ignored. For example, would the government outlaw personal interviews out of fear that such interviews would reveal the race of the applicants? Or would the government argue that such interviews are "race-neutral" on the belief that interviewers would be able to disregard an applicant's race? The fact that admission decisions are—and ought to be—subjective underscores why such decisions should be made by academic professionals.

C. This Court Should Not Use Its Judicial Power To Jeopardize A Longstanding And Widespread Practice When Social Expectations Have Crystallized Around Its Own Decision.

For the past twenty-five years, universities have built their admissions practices, and admitted thousands of students, based on Justice Powell's opinion in *Bakke*. Not only have universities extensively relied on that decision, but thousands of students have been schooled against its backdrop. This Court has eloquently cautioned against overruling important cases around which major social expectations have crystallized. *See Planned Parenthood v. Casey*, 505 U.S. 833, 856-58 (1992) (O'Connor, J., Souter, J., and Kennedy, J., announcing the opinion of the Court); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting); *Mapp v. Ohio*, 367 U.S. 643, 677 (1961) (Harlan, J., dissenting); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924). And much of what the Court stated in *Casey* can be said about *Bakke*: "[F]or two decades of economic and social developments, people have organized" their educational decisions, residential patterns, and personal relationships, "and made choices that define their views of themselves and their places in society, in reliance on the availability of" affirmative action. 505 U.S. at 856. "The ability of" persons of all races "to participate equally in the economic and social life of the Nation has been facilitated by" such practices, and "while the effect of reliance on" *Bakke* "cannot be exactly measured, neither can the certain cost of overruling" the decision "for people who have ordered their thinking and living around that case be dismissed." *Id.*

As societal patterns change, it is to be expected that law schools will change their practices accordingly. But this Court should not use the judicial power to deprive universities of the freedom to take race into account as one factor. After all, an entire generation of Americans has been

schooled under affirmative action, with the explicit blessing of—indeed, following a how-to-do-it manual from—the *Bakke* decision.

Bakke, like *Brown* and *Roe*, is one of the handful of cases that hundreds of thousands of Americans, and probably more, know by name, and one of the few cases that has so completely ordered American education. The decision has been built into the expectations of alumni, students, and prospective students, as well as the graduate schools and employers whom these universities feed. *See* Tora K. Bikson & Sally Ann Law, *Global Preparedness and Human Resources: College and Corporate Perspectives* 16-27 (RAND 1994). It would be a wrenching tear in the fabric of the law schools' operations to undo that reliance. And if overruling *Bakke* were also to mean suddenly that all federally funded private schools must *never* consider race in their admissions due to Title VI, a sharp *re*-segregation of higher education would inevitably occur. The resultant social upheaval—affecting millions of students, thousands of institutions of higher education, the legal profession, and society at large—would be immense and irreparable. Accordingly, this Court should tread cautiously when reliance interests on one of its own decisions are so high. *Casey*, 505 U.S. at 856-58.

II. *STARE DECISIS* IS PARTICULARLY IMPORTANT IN THE INSTANT CASE BECAUSE THE CONSTITUTION PROTECTS THE AUTONOMY OF UNIVERSITIES AND LAW SCHOOLS TO PURSUE THEIR EDUCATIONAL AND SOCIAL MISSIONS.

Some of the strongest proponents of autonomy within the university have been Justice Frankfurter, Justice Powell, and Judge Friendly of the Second Circuit. These jurists led this Court to unanimously recognize this constitutional principle in cases such as *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 226 (1985). This is made exceedingly clear by

the suggestion of *amicus* United States Government that universities could eschew for *all* applicants traditional standards of merit, such as standardized-test scores. This astonishing "remedy" to ostensibly achieve diversity would have dramatic consequences for both the quality and the character of student bodies, just as would requiring the most prestigious legal employers (such as law firms, judges, and other government officials) to hire the valedictorian of every law school. This suggestion is not a "less restrictive alternative" in any meaningful sense. Rather, admissions officials should have the freedom, without fear of federal judicial intervention, to review and consider an applicant's entire accomplishments and background in admitting a class that will further their schools' mission.

This Court has consistently recognized the strong First Amendment interest in deferring to universities in the academic setting:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, rather than through any kind of authoritative selection."

Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (brackets omitted). The benefits of such autonomy do not redound only to the institution, but rather "to all of us." *Id.*; *see also Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."); *id.* at 262 (Frankfurter, J., joined by Harlan, J., concurring in the result) ("Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling. . . . This means the exclusion of governmental intervention in the intellectual life of a university.").[11]

Academic autonomy is at the heart of this challenge to the University of Michigan's admissions process, as Justice Powell's seminal opinion in *Bakke* makes clear. In discussing the diversity rationale, Justice Powell built on Justices Frankfurter and Harlan's invocation of the "'four essential freedoms' that constitute academic freedom," one of which is to decide "'who may be admitted to study.'" *Bakke*, 438 U.S. at 312 (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in the result)); *see also id.* ("The freedom of a university to make its own judgments as to education includes the selection of its student body."). In *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1985), this Court unanimously invoked this very discussion by Justice

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[11] As Judge Friendly stated:

> When a decision to hire, promote, or grant tenure to one person rather than another is reasonably attributable to an honest even though partially subjective evaluation of their qualifications, no inference of discrimination can be drawn. Indeed, to infer discrimination from a comparison among candidates is to risk a serious infringement of first amendment values. A university's prerogative "'to determine for itself on academic grounds who may teach'" is an important part of our long tradition of academic freedom. *Sweezy v. New Hampshire*. Although academic freedom does not include "the freedom to discriminate," Powell, *supra*, 580 F.2d at 1154, this important freedom cannot be disregarded in determining the proper role of courts called upon to try allegations of discrimination by universities in teaching appointments.

Lieberman v. Gant, 630 F.2d 60, 67 (2d Cir. 1980) (op., per Friendly, J.) (citations omitted).

Powell to explain that "autonomous decision making by the academy itself" is necessary for such freedom to thrive. *See also Widmar v. Vincent*, 454 U.S. 263, 276-77 (1981) ("Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources or 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'") (citing Justice Frankfurter's opinion in *Sweezy* and Justice Powell's opinion in *Bakke*).[12]

Of course, academic freedom is not absolute. In circumstances of clear and purposeful discrimination motivated by animus, or perhaps in situations where Congress has spoken clearly about the appropriateness of intervention into university affairs in a specific area, it may be appropriate for federal courts to substitute their judgment against academic administrators. *See Washington v. Davis*, 426 U.S. 229, 244-45 (1976); Kathleen M. Sullivan, *After Affirmative Action*, 59 Ohio St. L.J. 1039 (1998).[13] But in the absence of such circumstances, this Court's decisions recognize a substantial sphere of autonomy for the university to act in ways that further its educational mission. *See Board of Regents v. Southworth*, 529 U.S. 217, 239 (2000) (Souter, J., concurring).

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[12] As Justice Stevens stated in *Widmar*: "Judgments of this kind should be made by academicians, not by federal judges, and their standards for decision should not be encumbered with ambiguous phrases like 'compelling state interest.'" 454 U.S. 263, 278-79 (1981) (Stevens, J., concurring in the judgment) (footnote omitted).

[13] As one court succinctly stated, "[a]cademic institutions are accorded great deference in their freedom to determine who may be admitted to study at the institution. As long as admission standards remain within constitutionally permissible parameters, it is exclusively within the province of higher educational institutions to establish criteria for admissions." *Martin v. Helstad*, 578 F. Supp. 1473, 1482 (W.D. Wis. 1983) (citation omitted) (also citing *Bakke* and *Sweezy*).

There are any number of analogies that help illuminate the special autonomy institutions of higher learning enjoy under the Constitution. For example, this Court has unanimously drawn upon review of personnel decision practices to delineate the contours of academic freedom:

> Add[ing] to our concern . . . is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, "a special concern of the First Amendment." *Keyishian v. Board of Regents*. If a "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies," *Bishop v. Wood*, far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require "an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision making."

Ewing, 474 U.S. at 226 (citations & footnote omitted). And, in the midst of this very language, the Court's unanimous opinion made clear that "[d]iscretion to determine, on academic grounds, who may be admitted to study, has been described as one of 'the four essential freedoms,' of a university." *Id.* at 226 n.12 (citing *Bakke*).

In addition, although far more circumscribed, the autonomy universities enjoy shares some similarities with the textually explicit protection accorded religious institutions. *See, e.g., Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-09 (1976) (holding that the court below "impermissibly substitute[d] its own inquiry into church polity and resolutions based thereon of those disputes," and that "[t]o permit civil courts to probe deeply enough into the allocation of power within a [hierarchical] church so as to decide . . . religious law [governing church polity] . . . would

violate the First Amendment" (third & fourth alterations in original) (quotation omitted)).

Academic freedom takes on an even greater significance in this case. Here, the people of the State of Michigan have enshrined the concept of institutional academic autonomy in their Constitution. *See* Mich. Const. art. VIII, § 5 (giving the elected Board of Regents of the University of Michigan "general supervision of its institution and the control and direction of all expenditures from the institution's funds"). Indeed, Michigan enacted the first constitutional provision for the separate governance of its state university in its 1850 Constitution. *See* Mich. Const. of 1850, art. XIII, §§ 6-8. Because the University of Michigan is constitutionally autonomous from the government, separation of powers principles prevent the state legislature from interfering with its autonomy, except in rare circumstances. "The Michigan courts have consistently construed the provision as a prohibition against all attempts by the legislature to interfere with the academic management of the university." J. Peter Byrne, *Academic Freedom: A "Special Concern of The First Amendment,"* 99 Yale L.J. 251, 327 (1989).[14]

Federal court interference would be an even more drastic interference as it would pit the power of the federal judiciary against a state actor with special constitutional significance, the University of Michigan. Vital principles of federalism are therefore at stake. In *Ambach v. Norwick*, 441 U.S. 68 (1979), this Court refused to apply strict scrutiny to a

[14] For example, Michigan courts have held unconstitutional legislative efforts to force appointments to faculty positions, *People v. Regents of Univ. of Mich.*, 18 Mich. 469 (1869); *People ex rel. Drake v. Regents of Univ. of Mich.*, 4 Mich. 98 (1856); to control the placement of departments, *Sterling v. Regents of Univ. of Mich.*, 68 N.W. 253 (Mich. 1896); to require divestiture of securities related to South Africa, *Regents of Univ. of Mich. v. State*, 419 N.W.2d 773 (Mich. Ct. App. 1988); and to tie substantive conditions to specific appropriations, *State Bd. of Agric. v. State Admin. Bd.*, 197 N.W. 160 (Mich. 1924).

state's decision to classify teachers on the basis of alienage, reasoning that

> [p]ublic education, like the police function, 'fulfills a most fundamental obligation of government to its constituency.' The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions. . . . Other authorities have perceived public schools as an "assimilative force" by which diverse and conflicting elements in our society are brought together on a broad but common ground.

Id. at 76-77 (citations omitted). Therefore, despite this Court's general view that heightened scrutiny applies to a state classification on the basis of alienage, *Ambach* applied a *rational-basis* standard. *Id.* at 79.

In precisely the same way, the people of the State of Michigan, cloaked with special authority from their Constitution, have decided to consider race in their admissions process to prepare their students to serve as citizens, to preserve the values of society, and to bring divergent elements of society together into a common space. Thus, this Court should accord substantial deference to the University of Michigan's decisions in this regard. *See Gregory v. Ashcroft*, 501 U.S. 458, 462 (1991) (recognizing that its "scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives" (quotation omitted)).[15]

[15] As this Court has stated, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). Indeed, this Court has often required federal courts to abstain from rendering judgment when a state constitutional provision is implicated, preferring the state courts to decide the issues first. *See, e.g., Reetz v. Bozanich*, 397 U.S. 82, 87 (1970).

A decision by this Court to force "race neutrality" in the admissions process would be inconsistent with *Bakke*, inconsistent with the principles of *stare decisis*, and inconsistent with the principles of academic autonomy. Moreover, it would have the same predictable effect as would forcing gender-blind admissions, geographic-blind admissions, or economic background-blind admissions—that is, admissions committees would be precluded from examining an applicant as a whole person, including all information that such committees, in their judgment, consider relevant to assessing both an applicant's accomplishments and the potential for contributing to the various strengths of a class of students, to a profession dedicated to serving diverse communities around the globe, and to society as a whole.

CONCLUSION

For these reasons, the Law School Deans respectfully request this Court to affirm the judgment of the Sixth Circuit below.

Respectfully submitted,

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